Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

CHRISTOPHER GERALD GLYNN,

Petitioner,

v.

ROY AL BOAT MANAGEMENT CORP., DANIEL J. SHAWHAN and F/V NO PROBLEM,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court may grant a judgment as a matter of law to deny an injured seaman a jury award of punitive damages where the defendant was found to have acted arbitrarily, willfully, and with bad faith in failing to provide maintenance (food and lodging) and cure (medical care).

2. Whether a District Court may order payment of maintenance and cure coextensive with the need of an injured seaman when the seaman has made out a prima facie claim for maintenance and cure pendente lite.

LIST OF PARTIES

Petitioner: Christopher Gerald Glynn

Respondents: Roy Al Boat Management Corp., Daniel J. Shawhan and F/V No Problem

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PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Christopher Glynn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra.* at App. 1) is reported at 57 F.3d 1495. The District Court's decision (Appendix, *infra.* at App. 25) is unreported. An interlocutory ruling of the District Court (Appendix, *infra.* at App. 47) is reported at 1993 AMC 367 and at 1992 WL 474578. The Magistrate Judge's order (Appendix, *infra.* at App. 52) is unreported. The July 31, 1995 order of the Court of Appeals denying petition for rehearing and rejecting suggestion for a rehearing en banc (Appendix, *infra.* at App. 55) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on June 21, 1995. A timely petition for rehearing was denied on July 31, 1995. (See Appendix, *infra.* at App. 55.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. § 688(a).

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF CASE

Christopher Gerald Glynn was injured on March 22, 1992 while serving as a crew member aboard the F/V No Problem, a fishing vessel owned by defendant Roy Al Boat Management Corp. and mastered by defendant Captain Daniel Shawhan. App. 2. The injury occurred when he slipped from a ladder in an ice hold while trying to lift the hatch to exit. App. 28. Glynn reported the injury by informing the ship's captain and other crew. When the vessel returned to Honolulu, Captain Shawhan fired Glynn. App. 8. Glynn demanded maintenance and cure,

filed suit in the District Court in Hawaii, and began medical treatment for his injured back. App. 27.

Service of process was made on the defendants and an extension of time to answer was agreed b tween counsel on the condition that the defendants pay Glynn's maintenance and cure. When the defendants refused to pay maintenance and cure, entry of default was taken against the defendants. App. 47.

The defendants petitioned the court to remove the entry of default, which the Magistrate Judge granted, on the condition that the defendants pay the maintenance and cure in the interim period up to the date of the removal of the default. This was after an evidentiary hearing on Glynn's entitlement to and the reasonableness of the maintenance and cure. App. 53.

The defendants appealed the Magistrate Judge's order and the District Court reversed, reasoning that the conditional removal of the default was effectively awarding "summary judgment" against the defendants on the maintenance and cure issue and was premature at this point. App. 50.

Glynn repeatedly asked Captain Shawhan for money to see the doctor. The vessel owner was given Glynn's medical records and informed by the doctor that Glynn would need four to six weeks of treatment and could not return to work for a minimum of three to six weeks. App. 27. The vessel owner was advised that Glynn was without funds or a place to stay. Glynn was forced to sleep in a car during part of his medical treatment for his back injury. The vessel owner conducted an independent medical examination and the defendants' doctor concluded

that Glynn's fall from the ladder was the cause of his back injury. App. 27.

The case was tried to a jury which returned a verdict in favor of plaintiff on all claims. In addition to compensatory damages, and maintenance and cure in the amount of $7,600, the jury awarded plaintiff $50,000 in punitive damages for the defendants' persistent failure to pay plaintiff's maintenance and cure. The jury found that Glynn was a seaman employed by the defendants who were liable for the accident. In addition, the defendants' failure to pay maintenance and cure was arbitrary, willful and in bad faith.

The District Court granted the defendants' motion for judgment as a matter of law to strike the punitive damages based upon *LaVoie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827, 831 (D. Haw. 1992), citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990) as authority. App. 36. Plaintiff's counsel offered proof of $61,069 in attorney fees through the verdict herein, and requested $27,500 for the legal work attributable to the maintenance and cure. In limiting the award of attorney fees to $7,600, the Court relied on the like sum awarded to plaintiff for his maintenance and cure.

In September 1995, by mandate of the Ninth Circuit, Glynn finally received his maintenance, the doctor was paid (cure) and plaintiff's counsel received $7,600 in attorney fees, three years and 5 months after suit was filed.

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel . . . They are emphatically wards of the admiralty.

–Justice Story[1]

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because The Maintenance And Cure Remedy, The Sole Means Of Protecting Seamen Who Become Injured Or Fall Ill In The Service Of Their Vessel, No Longer Has A Mechanism For Enforcement

The reason we have punitive damages is so that we can live in the kind of world in which we do not need to impose punitive damages. Seamen often become injured or ill in foreign ports. Seamen are totally dependent on vessel owners to provide medical care and support. Disabled seamen just cannot take care of themselves. They do not have to apply to the Court to become *wards of admiralty;* this is a status that has been conferred upon seamen as a group as a matter of law. *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 430-31 (1939); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 246-47 (1942). A reputable vessel owner will take care of his crew. Thus, punitive damages are necessary to deter vessel owners from abandoning their seamen in time of need.

> "Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules

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[1] *Harden v. Gordon,* 11 F. Cas. 480, 485 (C.C.D.Me. 1823).

> of the common law which would affect them harshly because of the special circumstances attending their calling. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."

Socony-Vacuum, 305 U.S. at 431.

A seaman who becomes injured or falls ill while in the service of a vessel has a right to "maintenance and cure" from the shipowner, which includes the cost of medical care, food, and lodging necessary for the seaman to reach the point of "maximum recovery." THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW. § 4-28 (2d ed. 1994). Maintenance and cure is a remedy that predates the medieval sea codes. *Id.* It was introduced into England as part of the Laws of Oleron by Richard I "the Lionheart" upon his return from one of the Crusades, *The Oceola*, 189 U.S. 158, 169 (1903); Martin J. Norris, *The Seamen as Wards of the Admiralty*, 52 MICH. L. REV. 479, 481 (1954). "As a working man's remedy it anticipated industrial workmen's compensation by almost a thousand years." Id at 483. The remedy is similar to worker's compensation, but more closely resembles health and accident insurance. The word "cure" in this connection is probably used in the sense of the Latin word from which it is derived; that is, "care" (Latin "cura"). *See, The Atlantic*, 2 F. Cas. 121, 131 (S.D.N.Y. 1849). It is the duty of the vessel owner to take care of the seaman in time of need; just as the guardian cares for its ward, the trustee cares for its cestui, and the fiduciary its beneficiary. *Garrett*, 317 U.S. at 246-47.

The primary reason for granting the ancient remedy of maintenance and cure is that seamen by the nature of their work are vulnerable to disastrous consequences if they are not provided for in times of ill health. The explanation of this policy was first articulated in the United States by Justice Story 172 years ago:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision not be made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.

Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D.Me. 1823).

Interim relief is available in a land-based workers' compensation scheme. After the worker applies for the remedy and an evidentiary hearing is conducted, a hearing officer can immediately grant interim relief pending the resolution of the claim. WEX S. MALONE, ET AL., CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 405-06 (1980). However, because seamen are not covered by any federal or state workmen's compensation scheme, the only way they can avoid dire consequences in times of injury and illness is by the prompt rendering of support by the shipowner. Thus, the critical issue is not whether the remedy is ultimately paid, but whether it is rendered in time to avert the deterioration of the health of the seaman in question. Accordingly, maintenance and cure was intended to be an automatic and immediate

remedy that did not require litigation as a prerequisite for recovery. "Thus, the breadth and inclusiveness of the shipowner's duty assure its easy and ready administration for 'it has few exceptions or conditions to stir contentions, cause delays and invite litigations.' " *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (quoting *Farrell v. United States*, 336 U.S. 511, 516 (1949)). In the Ninth Circuit today, however, the theoretical breadth of the shipowner's duty is negated by a complete absence of meaningful incentives for the shipowner to act on this duty.

II. Certiorari Should Be Granted To Resolve Conflicting Circuit Court Opinions On Whether Punitive Damages Are Available For Arbitrary, Willful, And Bad Faith Failure To Provide Maintenance And Cure And To Clarify The Scope Of *Miles*.

The Ninth Circuit Court of Appeals relied on *Miles v. Apex Marine*, 498 U.S. 19 (1990) in holding that punitive damages are not available for the bad faith, arbitrary, and willful failure to provide maintenance and cure. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1503 (9th Cir. 1995). The Fifth Circuit came to the same conclusion in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc). The Ninth and Fifth Circuit holdings are in conflict with the law in other circuits.

The First Circuit last addressed this issue in *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973). The *Robinson* court relied on the Supreme Court's holding and reasoning in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) to uphold an award of punitive damages for willful failure to pay maintenance and cure. *Id.* at 1051-52. The First Circuit has never since held that punitive damages are

unavailable under the general maritime law in general or for bad faith failure to pay maintenance and cure in particular.

The Eleventh Circuit also provides for punitive damages for willful and wanton failure to pay maintenance and cure. In *Hines v. J.A. Laporte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987), a maintenance and cure case, the court held that "both reasonable attorney fees and punitive damages may be awarded in a proper case." The court subsequently explained that these exemplary damages are available "if the plaintiff was entitled to maintenance and cure and the shipowner arbitrarily and willfully refused to provide it." *Garay v. Carnival Cruise Lines, Inc.*, 904 F.2d 1527, 1534 n.10 (11th Cir. 1990). The Eleventh Circuit recently reaffirmed the availability of punitive damages for failure to pay maintenance and cure in the post-*Miles* era. *Flores v. Carnival Cruise Lines, Inc.*, 47 F.3d 1120, 1127 (11th Cir. 1995). In *Flores*, the court denied the punitive damages claim in a seaman's maintenance and cure action only because the defendant "did not exhibit willful and wanton misconduct, which is the standard [plaintiff] must meet to recover punitive damages in admiralty law." *Id.* (citing *Hines*, 820 F.2d at 1188).

The Fourth Circuit has also held that punitive damages are available for arbitrary and willful failure to pay maintenance and cure in the post-*Miles* era if the punitive remedy is sought as part of the maintenance and cure action itself. *Manuel v. United States*, 50 F.3d 1253, 1259-60 (4th Cir. 1995). In *Manuel*, the issue was whether a seaman could bring a bad faith claim for failure to pay maintenance and cure independent from the maintenance and cure claim itself. *Id.* at 1258-59. The court found that

a punitive damages claim for the arbitrary and willful failure to pay maintenance and cure is not a free standing cause of action, but rather arises out of and is wholly dependent upon the claimant's successful recovery of the underlying claim for maintenance and cure. *Id.* at 1259-60. The court noted that "[c]ourts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied." *Id.* at 1260. The Fourth Circuit stated that "[p]unitive damages [are], however, merely an additional remedy in the seaman's maintenance and cure action." *Id.*

The conflict among the circuits derives from an overly broad reading of this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, the Court addressed the need to make the general maritime law uniform with analogous federal statutes reflecting Congress' plan for maritime tort law. Congress, however, has never addressed the unique remedy of maintenance and cure. Furthermore, the Court in *Miles* addressed neither punitive damages nor intentional misconduct. Yet, the Ninth Circuit extended the holding of *Miles* and denied punitive damages for the willful, arbitrary, and bad faith failure to pay maintenance and cure. This Honorable Court should grant certiorari in this case to resolve the conflict between the circuits on this issue and to clarify the scope of *Miles*.

The *Miles* uniformity principle does not control this case because that case did not address punitive damages or intentional misconduct and Congress has never spoken on the remedy of maintenance and cure. In *Miles*, the Court denied damages for loss of society sought in a general maritime wrongful death action brought by the

mother of a seaman killed in state territorial waters. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21-22 (1990). There, the Court merely stated that when Congress " 'speak[s] directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless.' " *Id.* at 25 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). The Court cited the holding in *Higginbotham* that DOHSA's explicit limitation of recoverable damages in *wrongful death* suits to "pecuniary loss sustained by the persons for whose benefit the suit is brought," forecloses recovery for nonpecuniary loss in a general maritime *wronful death* action. *Miles*, 498 U.S. at 24 (quoting 46 U.S.C. 762; citing *Higginbotham*, 436 U.S. at 622-23 (1978)) (emphasis added). The Court, however, noted that in *Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) it had properly created a general maritime wrongful death action because this involved "gap filling in an area left open by statute." *Miles*, 498 U.S. at 25.

These principles do not apply to maintenance and cure. Indeed, *Miles* has been extended beyond its logical meaning. Not only has Congress never spoken "directly" to the question of maintenance and cure, but maintenance and cure is an area Congress has left untouched. There are no analogous statutes. Thus, there is no Act in existence that would be affected, much less rendered meaningless, by the imposition of punitive damages for the bad faith failure to pay maintenance and cure; nor would this undermine the *Miles* concern for uniformity. *Miles* brings a general maritime law strict liability cause of action (unseaworthiness) in line with a statutory scheme for negligence (Jones Act). *Miles* did not address the

measure of damages in cases implicating bad faith conduct. Further, the nonpecuniary remedies proscribed by *Miles*, such as loss of society, are compensatory in nature. Although they do not compensate for a financial loss, they do recompense some form of deprivation. Punitive damages are very different, however, because they are designed as a deterrent to intentional misconduct, rather than as a form of compensation.

In its opinion, the Ninth Circuit emphasized that "*Miles* holds that damages recoverable on a general maritime cause of action . . . do not include losses not provided for in the 'uniform plan of maritime tort law Congress created.' " *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1503 (9th Cir. 1995) (quoting *Miles* at 37). Maintenance and cure, however, is a unique remedy that does not fit into and cannot be inconsistent with the Congressional plan for maritime tort law. It is an absolute obligation for a shipowner to care for the seamen in their employ who are injured or fall ill. This Court has expressly distinguished maintenance and cure from the Congressional enactments in maritime law. "Created thus with the contract for employment, the liability, unlike that for indemnity or that created later by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner." *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. at 730. It is important to understand that, unlike the types of remedies addressed by Congress and in *Miles*, maintenance and cure is not a form of damages but is a form of equitable relief designed to allow the seaman to recover from ill health. It is curative rather than compensatory.

The Ninth Circuit opinion also characterized maintenance and cure as "a pseudo-contractual obligation," and noted the "punitive damages are not normally recoverable on contract claims." *Glynn*, 57 F.3d at 1505 (citing *Vaughn*, 369 U.S. at 532-33). This view does not take into consideration the unique nature of maintenance and cure. As Justice Cardozo once explained, "[t]he duty to make such provision is imposed by the law itself as one annexed to the employment. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident." *Cortes v. Baltimore Insular Inc.*, 287 U.S. 367, 370 (1932). Thus, a bad faith failure to pay maintenance and cure is not subject to the same analysis as an ordinary contract dispute. It represents an intentional refusal to act on a duty specifically and absolutely placed upon shipowners by the general maritime law, a duty on which Congress has not spoken.

Not only has Congress never addressed maintenance and cure, but it is a unique remedy even in the area of general maritime law. Although *Miles* also precluded certain nonpecuniary damages in unseaworthiness actions (another area free from legislative guidance), the goal of the Court there was to remove an anomaly from the maritime law that allowed plaintiffs to recover damages in a judge-made strict liability action (unseaworthiness) that were unavailable in a negligence action (Jones Act). *Miles*, 498 U.S. at 32-33. This anomaly does not exist with respect to maintenance and cure because the obligation to pay maintenance and cure arises even absent unseaworthiness or negligence. *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975); *Aguilar*, 318 U.S. at 730. Courts, by awarding

punitive damages for the willful failure to pay maintenance and cure, do not overstep the delicate boundary separating the legislature from the judiciary.

Further, maintenance and cure does not give rise to the same analysis used in actions for negligence under the Jones Act or unseaworthiness under general maritime law because maintenance and cure does not require an injury within the scope of employment or any type of causation. *Vella*, 421 U.S. at 4; *Aguilar*, 318 U.S. at 732. The shipowner must pay for almost any injury or illness incurred by the seaman during the entire period of employment, and gross negligence on the part of the seaman will not reduce the claim. *Vella*, 421 U.S. at 4; *Aguilar*, 318 U.S. at 732. Only intentional misconduct on the part of the seaman can deprive him of his right to maintenance and cure. *Aguilar*, 318 U.S. at 730. Maintenance and cure is a remedy addressing a unique problem neglected by Congress that is distinct from those relating to torts addressed by claims for negligence under the Jones Act or unseaworthiness under the general maritime law.

This Court has often asserted the need to protect seamen from the harsh consequences of their dangerous line of work. "In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action." *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939). This Court has also stated that the Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not

to narrow it. Its provisions . . . are to be liberally construed to attain that end." The *Arizona v. Anelich*, 298 U.S. 110, 123 (1936). It would, therefore, be inappropriate to use such legislation, which is unrelated to maintenance and cure, as an instrument to deprive seamen who are injured or ill of a mechanism to enforce their right to the care they need when they need it.

In short, the Ninth and Fifth Circuits' reliance upon *Miles* is misplaced. In *Miles*, the Court addressed the need to make the general maritime law uniform with analogous federal statutes comprising Congress' plan for maritime tort law. Congress, however, has never addressed the unique remedy of maintenance and cure and the Court in *Miles* addressed neither punitive damages nor intentional misconduct. The burden of punitive damages is not unreasonable because it only punishes willful and callous misconduct that intentionally deprives disabled seamen of their ability to recover from illness or injury or even to survive, a right seamen have enjoyed for centuries. The Court should grant certiorari in this case to resolve the conflict between the circuits on this issue and to clarify the scope of *Miles*.

Attorney fees are not an adequate deterrent to the bad faith refusal to provide maintenance and cure when it is needed. The failure of the District Court to award attorney fees sufficient to compensate for the full and adequate value of the work performed to secure Glynn's recovery of maintenance and cure demonstrates the need for punitive damages.

Reasonable attorney fees are theoretically available for the legal work performed to obtain maintenance and

cure from the recalcitrant vessel owner under the general maritime law. *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962). In the present case, however, the Ninth Circuit refused to review the adequacy of the attorney fees awarded by the District Court. This is troubling because the District Court was concerned with and based its award of attorney fees upon the monetary amount of Glynn's recovery of maintenance and cure. The court stated that "[a]lthough it is not reflected in the record, Plaintiff and his counsel probably had a contingency fee agreement, which would entitle Plaintiff's counsel to a share of Plaintiff's recovery. . . . The award suggested by plaintiff's counsel is more than three times the recovery Plaintiff received on his claim for maintenance and cure. Such an award is not warranted in this case." App. 42-43. The effect of considering the amount of maintenance and cure recovered in determining attorney fees will be that counsel will be hesitant to pursue the rights of seamen who have been wrongfully denied maintenance and cure.

The amount of maintenance traditionally is a pittance (the portion of food allowed a monk); and the cure is customarily paid by the vessel owner directly to the medical provider. It is morally reprehensible and against public policy to suggest, as the District Court did, that the maintenance recovered should be subject to a contingency fee. In the absence of punitive damages, attorney fees limited as they were by the District court in the case at bar, are inadequate to protect the rights and health of the seaman.

III. Certiorari Should Be Granted To Afford Predictable And Adequate Incentives For Shipowners To Meet Their Obligation Under General Maritime Law To Promptly Provide Maintenance And Cure To Seamen Who Become Ill Or Injured In Their Employ.

"It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be understood and administered without technical considerations." *Farrell v. United States,* 336 U.S. 511, 516 (1949). The duty to provide maintenance and cure is readily identifiable by the shipowner. Liability for maintenance and cure "in no sense is predicated on the fault or negligence of the shipowner. . . . Only some willful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." *Aguilar v. Standard Oil Co. of New Jersey,* 318 U.S. 724, 730-31 (1943). Thus, shipowners quickly recognize when they have a duty to care for their disabled seamen. All that is needed for them to act on this duty is meaningful incentive. Punitive damages provide a just and reasonable incentive because they punish only intentional, callous, and bad faith misconduct, a deterrent this Court has approved in other types of tort actions. See, e.g., *T X O Productions Corp. v. Alliance Resource Corp.,* 113 S.Ct. 2711 (1993); *Pacific Mutual Life Insurance Co. v. Halsip,* 499 U.S. 1 (1991).

The Ninth Circuit has essentially said is that, in theory, a shipowner has an automatic and immediate obligation to provide maintenance and cure to an injured seaman, but that there is no vehicle to enforce or even encourage the shipowner to meet this obligation, short of

the threat of liability for inadequate attorney fees. Consequently, there is great room for abuse. If punitive damages are not applied to such intentional misconduct and attorney fees are granted in such limited measure, shipowners motivated by bad faith will be encouraged to conduct a cost-benefit analysis to determine whether or not to pay maintenance and cure promptly and when it is needed and required by the general maritime law. This cost-benefit analysis will normally lead to the failure to pay maintenance and cure. The shipowner will simply pay the maintenance and cure after the issue has been litigated, rather than when it is desperately needed by the seaman without suffering any meaningful penalty.

Under the Ninth Circuit's holding, refusal to pay maintenance and cure is the logical economic course of action. Without a mechanism for enforcement, maintenance and cure is a hollow remedy. The Ninth and Fifth Circuits have relied on *Miles*, to strip the general maritime law of this important deterrent. The Court should grant certiorari in this case to resolve the conflict between the circuits on this issue and to clarify the scope of *Miles*.

IV. Certiorari Should Be Granted To Clarify Whether Courts Have The Authority To Grant Maintenance And Cure On An Interim Basis Coextensive With The Injured Or Ill Seaman's Need On The Establishment Of A Prima Facie Case

The conflicting circuit courts, focus on attorney fees and punitive damages demonstrates the failure of the courts to understand the nature of maintenance and cure. Maintenance and cure is not a form of damages. It is a

form of equitable relief, designed to facilitate the recovery of disabled seamen.

The solution to the problem is neither to make it easier to obtain punitive damages and attorney fees nor to do away with these valuable deterrents when they are appropriate. It is the failure of the courts to administer the maintenance and cure remedy that creates the need for punitive damages awards and attorney fees. The cost of providing a disabled seaman with food, lodging, and medical care does not present a great burden on the shipowner, but can make a dramatic difference in the seaman's prospects for recovery. If disabled seamen can be provided with food, lodging, and medical care on an interim basis, coextensive with their need on the basis of the showing of a prima facie case, the remedy would once again provide disabled seamen with meaningful relief from the harsh consequences of maritime employment.

Maintenance and Cure is a simple matter that can be administered without the need for extensive litigation. "[T]he breadth and inclusiveness of the shipowner's duty assure its easy and ready administration for 'it has few exceptions or conditions to stir contentions, cause delays, and invite litigations.' " *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (quoting *Farrell v. United States*, 336 U.S. 511, 516 (1949)). A seaman is entitled to maintenance and cure once he establishes that his health has deteriorated while in the service of a ship. There is no question of fault or negligence. "Only some willful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." *Aguilar*, 318 U.S. at 730-31. This is a very low standard of proof that can be accurately assessed on the basis of a small measure of evidence. The court is not

punishing or compensating for a causative act or omission; it is providing the only source of recovery for a person engaged in a hazardous profession. Thus, the provision of food, lodging, and medicine to a disabled seaman should be provided on an interim basis on the establishment of a prima facie case without waiting for the results of a full blown trial. This would better align the remedy with its historical purpose, which is to provide care for injured and ill seamen before they suffer from neglect or abandonment and their condition actually deteriorates.

The present case is a tragic but common example of how difficult it is to obtain maintenance and cure. The absence of punitive damages and the courts' unwillingness to order payment of maintenance and cure on an interim basis effectively negates the remedy. In the case at bar, three years and five months transpired between the filing of Glynn's suit and the payment of his maintenance and cure. Glynn, suffering from an injured back, was required to sleep in a car and scramble for access to medical care without funds. App. 27. Soon after the injury, however, the magistrate judge had effectively ordered the defendant to pay maintenance and cure when he conditioned the removal of the default judgment against the defendant on the commencement of such payments. App. 50. The District Court invalidated the magistrate's order. The court found that Glynn had made out a prima facie case but had not met his burden of proof. App. 50. The only support that the court stated for its finding was that there was a dispute over whether the shipboard accident had actually occurred and that "Glynn continued to perform his duties aboard the ship

after the accident." App. 50. This demonstrates the District Court's failure to understand the low standard of proof in a maintenance and cure action. No shipboard injury is required. *Vella,* 421 U.S. at 4; *Aguilar,* 318 U.S. at 732. Certainly, there is no requirement that the seaman cease working. The only requirement is that the seaman suffers an injury or illness in the service of the ship. This had been established. Thus, the disputes of "material fact" cited by the court were not material at all and, in fact, the jury found that Glynn had been arbitrarily, willfully, and in bad faith deprived of maintenance and cure. App. 27. Glynn should have been provided with food, lodging, and medicine when the magistrate judge so ordered. The general policy should be that the magistrate judge can order the interim pre-trial payment of maintenance and cure.

Maintenance and cure is not an ultimate issue, it is an ancient solution to an immediate need. If it cannot be enforced in a timely manner, it loses its meaning. Subsequent monetary damages are not sufficient to balance the equitable purpose of maintenance and cure. The need for this interim provision of maintenance and cure has recently become more acute with the closing of seaman's public health hospitals. Marine hospitals for disabled seamen were established in 1798 in the United States. *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 246 (1942). They performed their function of providing care to disabled maritime workers for nearly two hundred years until their termination in 1981. *See,* PAUL K. CHAPMAN, TROUBLE ON BOARD, THE PLIGHT OF INTERNATIONAL SEAFARERS 57-58, 95-96, 127-128 (1992). Now, the only hope for an injured seaman is that the shipowners will act in good faith

according to their duty under the general maritime law to provide the necessary care. When this does not happen, the courts should provide for the maintenance and cure necessary for the seaman's recovery on an interim basis, coextensive with the need and on the basis of the establishment of a prima facie case.

The provision of such temporary pre-trial relief is not without precedent. A close analogy to the interim payment of maintenance and cure is the payment of alimony pendente lite. This duty for the interim provision of alimony and child support has the same purpose and the same old english common-law origins as the shipowner's duty to provide maintenance and cure. *See, e.g., Head v. Head,* 26 Eng. Rep. 972 (Ch.1745). Alimony pendente lite is similar to the legal obligation of shipowners to provide for their seamen, who are conferred with wardship status. *Socony-Vacuum,* 305 U.S. at 431. Temporary alimony was called "***maintenance*** of the wife during the pendency of the divorce action. It arose out of and was a substitute for the husband's common law duty of support." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 16.2 (2d ed. 1988) (emphasis added). As with maintenance and cure, the duty is almost absolute, and its enforcement is dependent upon the establishment of a low standard of proof; there are few possible defenses to a claim for alimony pendente lite.

One of the only defenses involves a denial of the existence of the marriage. This is similar to the shipowner's denial, as in the case at bar, that there was an employment relationship between seaman and vessel. In such cases, the courts do not deprive the spouse and/or child of the support they need while awaiting the result

of potential litigation. "Faced with this dilemma the courts compromise. If the marriage is alleged and not denied, it is assumed to exist and temporary alimony is granted on that basis. If the existence of the marriage is disputed, most courts require the wife to make a 'prima facie' case as to its existence, but do not require her to prove it as fully as at a trial on the merits." *Id.*

A spouse's duty to provide alimony pendente lite is normally provided by statute in the modern era, but is not dependent on such a provision. The D.C. Circuit has held that even where there is no statute with "an express provision for the allowance of alimony pendente lite in maintenance actions, it is well established that the District Court has jurisdiction to make such allowances under its general equity powers." *Howard v. Howard,* 112 F.2d 44, 45 (D.C. Cir. 1940). "Equity is no stranger in Admiralty; Admiralty courts are indeed, authorized to grant equitable relief." *Vaughan v. Atkinson,* 369 U.S. 527, 530 (1962).

Thus, as with alimony pendente lite, maintenance and cure is a judge-made equitable remedy that should be enforced by the court. In the case at bar, the Magistrate Judge was perfectly suited for this task as he operated under the strict scrutiny of the District Court. The Supreme Court does not need to wait for Congress to fix the administration of its own dockets.

CONCLUSION

By providing for punitive damages for a bad faith failure to pay maintenance and cure the courts will

discourage deliberate, intentional and economically driven misconduct that causes unnecessary physical harm and suffering. The strong policy goals of protecting seamen from the harsh conditions inherent in their line of work and promoting maritime commerce favors keeping punitive damages available in cases where the shipowner engages in intentional and bad faith refusal to meet its obligations under general maritime law to care for its injured seamen. Allowing such a remedy will not cause any inconsistency in the uniform plan created by Congress for the separate area of maritime tort law addressed in *Miles*. Further, the need for such a remedy will be made more remote by allowing the magistrate judges to order the interim payment of maintenance and cure during the pendency of the litigation. The need for maintenance and cure is immediate and the suffering and health deterioration it is designed to prevent cannot be postponed during the lengthy resolution of a legal dispute. The relief should therefore also be immediate and coextensive with the need of the disabled seaman.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER GERALD GLYNN, *Plaintiff-Appellant-Cross-Appellee,* v. ROY AL BOAT MANAGEMENT CORP.; DANIEL J. SHAWHAN, in personam; F/V NO PROBLEM, O.N. 650399, her engines, equipment, appurtenances, catch, in rem; F/V FULL MOON, her engines, equipment, appurtenance, cargo freight and catch, in rem, *Defendants-Appellees-Cross-Appellants.*	Nos. 93-15546 93-15681 D.C. No. CV-92-00182-DAE OPINION

Appeals from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
May 10, 1994 – Honolulu, Hawaii

Filed June 21, 1995

Before: Jerome Farris, Robert R. Beezer, and Pamela Ann Rymer, Circuit Judges.

Opinion By Judge Rymer*; Dissent by Judge Rymer

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* Parts I, II, IV, and V of the opinion by Judge Rymer; part III by Judge Farris.

COUNSEL

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James E. Ross, James E. Ross & Associates, Houston, Texas, for the defendants-appellees-cross-appellants.

OPINION

RYMER, Circuit Judge:

These appeals require us to decide who can be an "employer" for purposes of a seaman's suit under the Jones Act, 46 U.S.C. § 688, the propriety of punitive damages and attorney's fees awarded on a claim for failure to pay maintenance and cure, and whether the issue of prejudgment interest must be submitted to the jury when a maritime claim is tried by a jury.

Christopher Glynn brought suit under general maritime law and the Jones Act for injuries allegedly suffered as a crew member on board the F/V NO PROBLEM. The vessel was owned by Roy Al Boat Management Corporation, and mastered by Captain Daniel Shawhan. The district court[1] determined that Roy Al was Glynn's "employer" but left Shawhan's "employer" status for the jury to decide. The jury returned special verdicts against both Roy Al and Shawhan on Glynn's claims for

[1] The presiding judge at trial was the Hon. Spencer Williams, sitting by designation.

unseaworthiness, negligence, and maintenance. It also awarded punitive damages after finding that Roy Al and Shawhan acted arbitrarily, willfully, and with bad faith in failing to provide maintenance and cure. The district court awarded attorney's fees on the claim for maintenance and cure, but granted judgment notwithstanding the verdict on punitive damages as it believed that punitive damages are unavailable as a matter of law. The court also declined to award prejudgment interest on the ground that it is a question for the jury which Glynn waived by failing to request an instruction. Both parties appeal.

We conclude that the court properly determined that Roy Al, as the vessel owner for whom Glynn worked, was Glynn's Jones Act "employer" because the relationship bears no indicia of a joint venture other than the fact that Glynn's wages were determined by a percent of net profits. We also hold that there can be no more than one "employer" for purposes of the Jones Act. Submitting the question of Shawhan's "employer" status to the jury was therefore error, requiring reversal of the judgment against him for negligence.

On Glynn's cross-appeal we conclude that the district court properly granted JNOV on punitive damages because they are unavailable on claims for unpaid maintenance and cure. Finally, we hold that when a maritime claim is tried to a jury, the issue of prejudgment interest is for it to decide.

As we have jurisdiction under 28 U.S.C. § 1291, we affirm in part and reverse in part.

I

To recover under the Jones Act,[2] the plaintiff must show that the defendant was his employer at the time of injury. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 787 n.6 (1949). Although both parties make a number of arguments, the dispute boils down to whether the district court should have instructed the jury that Glynn was "an employee of Defendant Shawhan or Roy Al Boat Management Company, or both . . . [and] that it has already determined that as a matter of law plaintiff was an employee of Defendant Roy Al Boat Management Company." As Roy Al, Shawhan, and F/V NO PROBLEM jointly appeal and point no fingers at one another, we are not concerned here with whether one rather than the other should be Glynn's employer.[3] Rather, all contend that the district court went astray by determining that an employer/employee relationship existed as a matter of

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[2] The statute provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

46 U.S.C. app. § 688(a).

[3] Roy Al does not contend that Glynn's employer was Shawhan *instead of* Roy Al; rather, it has maintained that Glynn was not an employee of either Shawhan or itself. Nor has it taken the position that Shawhan had a bareboat or demise charter, such that he would be the owner pro hac vice of the vessel, and as a result, Glynn's employer. *See The Norland (Loe v. Goldstein)*, 101 F.2d 967, 971 (9th Cir. 1939).

law. Roy Al maintains that the jury could have found that Glynn was a joint venturer or independent contractor, not an employee.[4] Shawhan in turn argues that it was erroneous to submit his status to the jury because, having already found that Roy Al was Glynn's employer, the court could not also let the jury find that he too could be a Jones Act employer.[5] Glynn, on the other hand, urges that no reasonable jury could have found that he was a joint venturer or independent contractor, and that he could be employed by Shawhan as well as Roy Al.[6]

A

We have long held that whether an employer/employee relationship exists is usually a question of fact for the jury, so long as there is an evidentiary basis for its consideration. *See, e.g., Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 989 (9th Cir. 1987); *The Norland (Loe v. Goldstein)*, 101 F.2d 967, 971-73 (9th Cir. 1939). Roy Al contends that

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[4] Although Roy Al suggests that Glynn could have been an independent contractor, its argument focuses entirely on the possibility of the jury finding him to be a joint venturer.

[5] Glynn suggests that we should not reach this question because Roy Al and Shawhan waived their right to challenge the sufficiency of the evidence by failing to renew their motion for a directed verdict at the close of the evidence. We disagree, because both opposed, and therefore preserved their objection to, the court's determination as a matter of law that Glynn was Roy Al's employee and that more than one person could be a Jones Act "employer."

[6] In the district court Glynn conceded that "the law is pretty clear that you've got one Jones Act employer," but argues to the contrary now.

the jury could have found that Glynn was a joint venturer based on evidence that Shawhan and the crew were paid percentages out of 100 percent of the net profit, Roy Al managed the joint venture's administrative work and contributed the F/V NO PROBLEM, each crew member's gear was deducted from his share of net profit, Shawhan cut the checks for the crew's share, and Shawhan understood himself to be self-employed.

The facts are not in dispute. When Glynn was hired in late January 1992, Shawhan told him that he was captain, that the boat was owned by Roy Al, and "that we all worked for them." Glynn acknowledged in writing that he had signed on as a crew member of the F/V NO PROBLEM, owned by Roy Al and mastered by Shawhan; that his term of employment would begin upon signature of the document and end after Glynn gave two weeks notice; that he agreed to being compensated 8.3 percent of the net profit for each trip; and that "immediate termination of the job will take place" if caught with alcohol, illegal drugs, or narcotics, and that "all pay due will be confiscated by the captain."

As master, Shawhan gave all orders on the vessel. He told crew members when to show up for work when they were at dock, and set the schedule when they were fishing. He was not an officer or director of Roy Al, and had no charter agreements with it.

Shawhan and Roy Al made the decision to bring the NO PROBLEM to Hawaii. Hawaii Seafood in Honolulu managed the vessel. Bills for fuel, bait, or gear were sent to Hawaii Seafood, which would either cut the checks or forward them to Roy Al for payment; when Shawhan

bought supplies himself, he got an advance from Hawaii Seafood after it was authorized by Roy Al. As agreed with Roy Al, Shawhan delivered the fish caught only to Hawaii Seafood.

After calculating the net profit for a fishing trip, Roy Al would keep 50 percent and send a check for the other 50 percent to Shawhan. From his share, Shawhan paid the crew members their agreed percentage of the total net profit. Under this arrangement, Shawhan believed himself to be self-employed.

Glynn's paycheck from the voyage was a personal check written by Shawhan and his wife. Usually Shawhan would purchase new equipment or rain gear for a new crew member and deduct the cost out of his paycheck. In Glynn's case, however, Shawhan provided Glynn with boots to use on the vessel but agreed to let Glynn keep them without charge. Finally, when Glynn showed up late for work while the NO PROBLEM was in dock, Shawhan fired him.

While there is no settled set of criteria for determining whether a Jones Act employment relationship exists, the Supreme Court has indicated that "[o]ne must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports?" *Cosmopolitan*, 337 U.S. at 795. The Third Circuit similarly focuses on the degree of control exercised over the crew member and looks to factors such as payment, direction, supervision, and source of the power to hire and fire. *Matute v. Lloyd*

Bermuda Lines, Ltd., 931 F.2d 231, 236 (3d Cir.), *cert. denied*, 502 U.S. 919 (1991).

Considering these factors, no reasonable jury could have found that Glynn was anything other than an employee. When he signed on, he was told that he and Shawhan worked for Roy Al. Roy Al and Shawhan decided where the vessel would go. Glynn had no control over when, where, or how long the fishing would occur. He had no say in managing, operating, or supervising the boat or its crew. His contract speaks in terms of compensation and his pay could be confiscated if he were found with contraband. The cost of his gear was not deducted from Glynn's share of the profit. He was hired on, could leave or be terminated, and was indeed fired. All of these facts point to an employment relationship; only the fact that Glynn's compensation was a percentage of net profit supports a finding of joint venture, but payment by shares is not inconsistent with the employer/employee relationship.[7] *Southern Shell Fish Co. v. Plaisance*, 196 F.2d 312, 314 (5th Cir. 1952); *see Callan v. Cope*, 165 F.2d 703 (9th Cir. 1948). Under these circumstances, we cannot say the district court erred in holding as a matter of law that Glynn was an employee of Roy Al.

The Norland, upon which Roy Al relies, is not to the contrary. In addition to being paid by shares, the crew in that case decided when and where to fish, and when and

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[7] Glynn's IRS Form 1099, which contained no deductions for tax or social security, might arguably be probative but for the fact that it could not have been prepared or furnished to Glynn before his injury or this litigation. Roy Al conceded as much at argument.

where to sell the catch. Moreover, the owner of the boat had nothing to do with the purchase of supplies, food, or equipment. *The Norland*, 101 F.2d at 970. It was also unclear whether there was a demise charter of the vessel. *Id.* at 971-72. These factors, which are absent in the instant case, presented a jury question whether a joint venture or employment relationship existed.

B

After determining as a matter of law that Roy Al was Glynn's Jones Act employer, the district court left it to the jury to decide whether Shawhan was also an employer. In denying Shawhan's motion for a new trial, the court relied on two Fifth Circuit opinions, *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975), *clarified*, 546 F.2d 675 (1977), and *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980), to conclude that Glynn could have more than one Jones Act employer. We disagree that these decisions control because the Supreme Court indicated in *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949), that there can be only one Jones Act employer, and neither Glynn nor Roy Al has ever argued that Shawhan was Glynn's sole employer.

The Court states in *Cosmopolitan* that "[w]e have no doubt that under the Jones Act only one person, firm, or corporation can be sued as employer." *Id.* at 791. In the face of the plaintiff's argument that he could sue a general agent of the United States as his Jones Act employer, the Court indicated that "[e]ither Cosmopolitan or the Government is that employer." *Id.* Of the relatively few courts since *Cosmopolitan* to consider the issue, most have

interpreted this language to mean that a plaintiff can hold only one employer liable under the Jones Act. *See, e.g., Savard v. Marine Contracting Inc.*, 471 F.2d 536, 541 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Hickman v. Ohio Barge Line, Inc.*, 376 F. Supp. 1092, 1094 (W.D. Pa. 1974); *Trexler v. Tug Raven*, 290 F. Supp. 429, 451 (E.D. Va. 1968), *rev'd on other grounds*, 419 F.2d 536 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970).

Neither *Spinks* nor *Guidry* is to the contrary. *Spinks* involved a "borrowed servant" arrangement under which the injured seaman's immediate employer (Labor Services) provided his labor aboard a barge owned by another company (Chevron). In that context, the court suggested that "[i]t would seem reasonable . . . that a seaman may have more than one Jones Act employer," 507 F.2d at 225, but concluded that it "need not . . . pass on the question whether Spinks could sue Chevron and Labor Services under the Jones Act" because "Spinks sued only one employer – Labor Services," *id.* at 226. *Guidry* cites *Spinks* for the proposition that "[i]t . . . may be possible for a seaman to have more than one Jones Act employer" in a similar situation. 614 F.2d at 452. In *Guidry*, however, the court concluded that under the facts of the case, there was no basis for finding that at the time of his injury, the plaintiff was employed as a "seaman" by one of the defendants. *Id.* at 453-54. Thus, the statements in both cases about the possibility of more than one Jones Act employer are dicta, and in any event are not persuasive in the case of Shawhan and Roy Al who do not contend that one, rather than the other, is the employer.

For these reasons, the jury should not have been allowed to consider whether Shawhan was also Glynn's

employer or to return a verdict against him on Glynn's negligence claim under the Jones Act.

II

Both sides challenge the district court's award of attorney's fees on Glynn's claim for failure to pay maintenance and cure. Roy Al suggests that attorney's fees are not available in the absence of a finding of bad faith, whereas Glynn argues that the district court properly found that he was entitled to attorney's fees under *Vaughan v. Atkinson*, 369 U.S. 527 (1962), but erred because it failed to consider the appropriate factors set out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

The availability of attorney's fees for maintenance and cure claims has been established since *Vaughan*, in which the Court held that the injured seaman could recover attorney's fees incurred to secure a maintenance and cure award because the shipowner had been "willful and persistent" in its failure to investigate his claim or to pay maintenance. *Id.* at 531, 533. Although availability of attorney's fees was raised as an issue in Roy Al's brief, it was not seriously argued and Roy Al does not appeal the jury's verdict that it willfully and arbitrarily refused to pay maintenance and cure. Therefore we treat that issue as abandoned and turn instead to whether the district court abused its discretion in fixing the amount.

Glynn requested $61,069.01, of which $6,000 related to a salvage issue and the balance to prosecuting the entire action, including the Jones Act and unseaworthiness claims as well as the claim for maintenance and cure.

He argues that because these claims were inextricably intertwined, and the defense was that the accident simply did not occur, it was impossible to separate the fees incurred by claim. As a result, Glynn suggested splitting the fees in half ($27,500). The district court, however, found that an award in that amount, which would have been more than three times the recovery for maintenance and cure, was not warranted.

In *Kerr*, we set out a number of factors that courts must consider in determining reasonable attorney's fees.[8] Glynn contends that the district court focused instead on how much the jury awarded him for maintenance, which, he submits, is not a proper consideration; if it were, injured seamen with relatively minor claims would never find counsel willing to take on their case. This would have the effect of undermining the policy animating *Vaughan*. However, the district court did not focus solely on the amount of maintenance and cure recovered. Judge

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[8] These factors are:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr, 526 F.2d at 70.

Williams acknowledged the *Kerr* factors in his order, discussed them,[9] and considered the amount involved, how significant the maintenance and cure claim was in the trial, and the results obtained. Whether or not a higher award would have been appropriate, we cannot say the court abused its discretion in finding otherwise.

III

Glynn challenges the district court's ruling that he was not entitled to recover punitive damages for willful and arbitrary failure to pay maintenance and cure. He argues that the court erred in extending *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which held that non-pecuniary damages are unavailable in a wrongful death action, to the availability of punitive damages under the general maritime law when the claim is not a statutory cause of action and is not otherwise covered by the Jones Act. Glynn points out that we have previously recognized that punitive damages are available for failure to pay maintenance and cure, *Evich v. Morris*, 819 F.2d 256 (9th

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[9] He found that:

> Plaintiff's maintenance and cure claim did not engender complicated questions of fact or law and constituted only a small portion of the trial. Furthermore, the case was filed and tried in less than a year and nothing in the record suggests that Plaintiff's attorney was required to conduct complicated discovery or legal research in preparation for this trial. Given the simplicity of the issues involved, it was not necessary for Plaintiff to be represented by an attorney with extraordinary or specialized skills to prosecute his claim properly.

Cir.), *cert. denied*, 484 U.S. 914 (1987), and contends that *Miles* affords no basis for overruling the view that punitive damages can be sought under general maritime law.

Roy Al and Shawhan argue that whereas this circuit has allowed attorney's fees for arbitrary, recalcitrant or unreasonable failure to provide maintenance and cure, *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985), it has never authorized the recovery of punitive damages. They note that the cases upon which Glynn relies were decided before *Miles*, and that other circuits have interpreted *Miles* as applying more broadly than to wrongful death actions. *See, e.g., Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.) (punitive damages not available under general maritime law), *cert. denied*, 114 S. Ct. 304 (1993); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994) (no punitives available on unseaworthiness claim after *Miles*). In any event, they suggest, an award of punitive damages in addition to attorney's fees runs afoul both of the *Miles* policy which favors uniformity in disallowing nonpecuniary damages, and the Supreme Court's earlier opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), which held that attorney's fees may be awarded in maintenance and cure cases where the defendant's default is "callous" or "willful and persistent." *See Kraljic v. Berman Enters., Inc.*, 575 F.2d 412 (2d Cir. 1978) (*Vaughan* does not permit recovery of punitive damages in addition to attorney's fees).

We have not squarely addressed this issue before.[10] As Glynn notes, we previously said in *Evich* that punitive

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[10] Three district courts in our circuit have considered the question. Two concluded that *Miles* does not extend to

damages are available for failure to pay maintenance and cure. However, that was not the question before the court, and the statement was dictum. We were considering whether punitive damages were available in a federal maritime survival action under general maritime law. In holding that they were, we remarked that "[p]unitive damages are available under general maritime law for claims of unseaworthiness [citations omitted], and for failure to pay maintenance and cure, *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir. 1973)." *Evich*, 819 F.2d at 258.[11]

In *Miles*, the Court held that there is no right to recover for loss of society in an action for the wrongful death of a seaman, regardless of whether that action is brought under the Jones Act, the Death on the High Seas Act, or general maritime law. Having traced the genesis of the Jones Act in the FELA, with its limitation to recovery only for pecuniary loss, the Court assumed that the

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maintenance and cure claims, *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621, 624 (D. Alaska 1992); *Ridenour v. Holland Am. Line Westours, Inc.*, 806 F. Supp. 910, 911 (W.D. Wash. 1992), and one held that punitive damages are unavailable under *Miles*. *La Voie v. Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827, 831 & n.3 (D. Haw. 1992).

[11] Likewise in *Sample v. Johnson*, 771 F.2d 1335, 1347 n.12 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), where we were considering whether an injured longshoreman had a private right of action to sue for damages in excess of those prescribed by the LHWCA, we noted in passing that "[p]unitive damages are awardable, in some circumstances, to a seaman where payment for maintenance and cure is wrongfully denied." Both *Evich* and *Sample* pre-date *Miles* and referred to pre-*Miles* cases.

Congress intended to incorporate the pecuniary limitation on damages into the Jones Act as well. Since recovery for loss of society was not available under the Jones Act, it reasoned that courts are not free to allow such remedies under general maritime law and that recovery of lost future earnings is likewise preempted. 498 U.S. at 32-33, 36 ("Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent on them."). As the Court concluded:

> [i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32-33. Thus, *Miles* holds that damages recoverable on a general maritime cause of action – there, for the wrongful death of a seaman – do not include losses not provided for in the "uniform plan of maritime tort law Congress created." *Id.* at 37.

A number of circuits, including our own, have extended the *Miles* rationale to other claims arising under the general maritime law, and to punitive damages. For example, a number of courts have held that *Miles* applies to personal injury claims as well as to wrongful death claims. *See, e.g., Horsley v. Mobil Oil Corp.*, 15 F.2d 200, 203 (1st Cir. 1994) (under general maritime law, no right to

recover for loss of society in unseaworthiness action involving nonfatal injury); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (per curiam) (same); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 132 (5th Cir.) (same), *cert. denied*, 113 S. Ct. 190 (1992). The First and Sixth Circuits have also held that the reasoning in *Miles* extends to recovery of punitive damages in claims arising under the general maritime law. *Horsley*, 15 F.3d at 203 (unseaworthiness claim involving nonfatal injury); *Miller*, 989 F.2d at 1459 (wrongful death action alleging unseaworthiness).

Only the Fifth Circuit has considered the availability of punitive damages in maintenance and cure cases after *Miles*. It continues to follow its pre-*Miles* precedent in *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987), which upheld a punitive damage award for failure to pay maintenance and cure. As the court recently explained in a per curiam opinion in *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), *Miles* is not so directly contrary to *Morales* as to allow a panel to depart from previous decisions despite an argument of "great force" that punitive damages under the general maritime law run counter to *Miles*. *Guevara*, 34 F.3d at 1284. However, Judge Garwood in a concurring opinion urged en banc reexamination, since granted, 1994 U.S. App. LEXIS 31032 (No. 92-4711) (5th Cir. Nov. 4, 1994), on the footing that:

> If the First and Sixth Circuits, the Texas Supreme Court, and all the rest of the courts that have considered the matter, are correct that *Miles* bars recovery of punitive damages in a cause of action for unseaworthiness, as I believe

> they are, then this Court en banc should seriously rethink its previous panel decisions allowing punitive damages in maintenance and cure cases.

34 F.3d at 1285 (footnote omitted). Unlike the Fifth Circuit, we are not constrained by binding precedent on this question. *See supra; see also Guevara*, 34 F.3d at 1286 & n.4.

Because *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance. Rather, we must also look to *Vaughan v. Atkinson*, in which the Court for the first time allowed recovery beyond the expenses required for maintenance and cure.

As we indicated in *Evich*, punitive damages were generally held to be available in the pre-*Miles* era for claims under general maritime law, including the willful failure to pay maintenance. *See, e.g., Pocahontas*, 477 F.2d 1048 (1st Cir. 1973) (punitive damages recoverable for nonpayment of maintenance and cure); *Kraljic*, 575 F.2d 412 (2d Cir. 1978) (punitives recoverable for nonpayment of maintenance and cure, but limited to amount of attorney's fees); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984) (punitive damages for nonpayment of maintenance and cure); *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) (shipowner refusing to pay maintenance and cure subject to escalating scale of liability, including punitive damages); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) (punitives available for withholding of maintenance and cure). In each of these cases, however, the circuits upholding the availability of

punitive damages for failure to pay maintenance relied, directly or indirectly, on *Vaughan v. Atkinson*.[12] In *Vaughan*, the Court for the first time acknowledged that damages for the failure to give maintenance and cure may include necessary expenses, including attorney's fees, when the failure to pay maintenance is willful and persistent. A seaman had sued for maintenance and cure and sought attorney's fees because the vessel owner failed to investigate his claim. Although punitive damages as such were not at issue, the Court held that the seaman was entitled to attorney's fees because the shipowner's default was "callous," "willful and persistent":

> While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows, the recovery may also include necessary expenses.
>
> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither

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[12] In *Pocahontas*, the First Circuit found "[s]upport for such an award . . . in *Vaughan v. Atkinson*," 477 F.2d at 1051, but relied on that portion of the *dissenting* opinion which embraced the notion of exemplary damages. *Id.* (quoting *Vaughan*, dissenting op., 369 U.S. at 540, quoted infra). The Second Circuit relied on *Vaughan* in holding that punitive damages are limited to a seaman's attorney's fees. *Kraljic*, 575 F.2d at 416. The Fifth Circuit relied on *Pocahontas*, and noted *Pocahontas's* reliance on *Vaughan*. *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981) (unseaworthiness); *Holmes*, 734 F.2d 1110 (maintenance and cure). In *Hines*, the Eleventh Circuit stated that while *Vaughan* is not dispositive, following *Merry Shipping*, exemplary damages would not be foreclosed even if attorney's fees were punitive in nature. 820 F.2d at 1189.

> admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him. . . . The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

369 U.S. at 530-31 (citations and quotations omitted). Justice Stewart, joined by Justice Harlan, dissented on the footing that there was no basis for departing from the rule that "counsel fees may not be recovered as compensatory damages." *Id.* at 540. The dissent further stated:

> However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.

Id. (citations omitted).

We considered *Vaughan* in the context of a maintenance and cure claim in *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984). There, the seaman claimed that he should have been awarded attorney's fees in conjunction with his maintenance and cure award; we appeared to treat *Vaughan* as authorizing attorney's fees incurred to secure a maintenance and cure award as an additional item of maintenance and cure, and agreed with the Second Circuit that attorney's fees are available "only when

the failure to provide maintenance and cure was arbitrary, recalcitrant or unreasonable."[13] *Kopczynski*, 742 F.2d at 559.

Whether or not the attorney's fees permitted in *Vaughan* should be regarded as "punitive" because based on callous and willful conduct, *see Kraljic* (so characterizing *Vaughan*); *but see Guevara*, 34 F.3d at 1288-1290 (concurring opinion, construing *Vaughan* as fee-shifting case in accord with bad-faith exception to the American rule for abuse of litigation process), we see no support for punitive damages in addition to attorney's fees in *Vaughan* itself, or our interpretation of it in *Kopczynski*. Instead, by allowing attorney's fees contrary to the normal American rule, *Vaughan* provides seamen with an appropriate remedy for the "necessary expenses" and damages caused by a willful and persistent failure to pay what is due: hiring a lawyer, filing suit, and incurring legal expenses on top of expenses for their own maintenance and cure.

We see no other reason why punitive damages, in addition to attorney's fees, should be allowed. The threat of liability for attorney's fees adequately serves to deter recalcitrance, as they would likely exceed interim maintenance and cure and the use of money which would otherwise have paid it. Punitive damages, in addition to attorney's fees, are thus not needed to provide a powerful incentive for shipowners to investigate and pay promptly.

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[13] Even though the vessel owner had appealed an award of punitive damages, and we agreed that "such damages are not recoverable in this case," our discussion focused on whether punitives are recoverable under the Jones Act. *Id.* at 560.

We are also mindful that maintenance and cure is a pseudo-contractual obligation, *Vaughan*, 369 U.S. at 532-33, and that absent contrary authority – which *Vaughan* does not afford – punitive damages are not normally recoverable on contract claims. Finally, limiting recovery to pecuniary damages is consistent with *Miles*.[14]

We therefore hold that punitive damages are not available, although attorney's fees are, where the shipowner has been willful and persistent in its failure to investigate a seaman's claim for maintenance and cure or to pay maintenance.

IV

Glynn also appeals the district court's refusal to award prejudgment interest because it was not submitted to the jury. Every other circuit that has considered the issue has held that where a maritime claim is tried before a jury, the amount of prejudgment interest must be submitted to the jury. *See, e.g., Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 740 (6th Cir. 1986); *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55 (5th Cir. 1981); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1052-53 (1st Cir. 1973); *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732, 735 (2d Cir. 1955). All of the cases cited by Glynn were admiralty cases tried to the court. We see no reason to part company with other circuits on this point.

Glynn presented no evidence regarding prejudgment interest, nor did he request a jury instruction or object to

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[14] Punitive damages are nonpecuniary damages. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987).

the failure to give one. As the parties did with respect to the amount of attorney's fees, they could have stipulated that the amount of interest would be determined by the court. Not having done so, we see no reason to disturb the district court's decision that Glynn waived entitlement to prejudgment interest.

V

Finally, Glynn asserts that the district court erred in ruling that a magistrate could not order payment of maintenance and cure as a condition for removing a default entered against Roy Al, Shawhan, and the F/V NO PROBLEM. The district court found there was a material issue of fact about whether Glynn was entitled to maintenance and cure, so that summary judgment would have been premature. Therefore, while relief from default may be conditioned to rectify "any prejudice suffered by the non-defaulting party as a result of the default and the subsequent reopening of the litigation," *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1546 (9th Cir. 1988) (per curiam), there is no authority suggesting that lifting a default can be conditioned on paying maintenance before the issue is ripe for decision on the merits. *Cf. Thorpe v. Thorpe*, 364 F.2d 692, 694-95 (D.C. Cir. 1966) (requiring defendant to place in escrow not only amount of default judgment, but maximum amount demanded by plaintiff in her complaint, was "unprecedented" condition that could not be imposed without sufficient supporting findings to show that it represented reasonable exercise of discretion).

Glynn argues that the strong public policy favoring prompt payment of maintenance and cure warrants the conditions imposed in this case. *See Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975).[15] However, whether Glynn's alleged accident aboard the NO PROBLEM even occurred was a disputed issue of fact that had to be determined before Glynn could prevail on his claim. Under these circumstances, the district court did not err in concluding that a grant of maintenance was premature.

Each side shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

RYMER, Circuit Judge, dissenting in part:

I dissent from the majority's opinion in Part III only because I feel constrained by our court's prior statement in *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), that punitive damages are available for failure to pay maintenance and cure.

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[15] Denial of maintenance and cure when the seaman's injury, though in fact permanent immediately after the accident, is not medically diagnosed as permanent until long after its occurrence would obviously disserve and frustrate the "combined object of encouraging marine commerce and assuring the well-being of seamen." A shipowner might withhold vitally necessary maintenance and cure on the belief, however well or poorly founded, that the seaman's injury is permanent and incurable.

Id.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHRISTOPHER GERALD GLYNN Plaintiff, v. ROY AL BOAT MANAGEMENT CORP.; DANIEL J. SHAWHAN, *In Personam* and the F/V NO PROBLEM, O.N. 650399 *In Rem*, Defendants.	CIVIL NO. 92-00182 DAE ORDER DENYING DEFENDANTS' MOTION FOR A NEW TRIAL; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR INTEREST, COSTS AND ATTORNEY'S FEES; DENYING DEFENDANTS' MOTION FOR SANCTIONS; DENYING PLAINTIFF'S MOTION FOR SANCTIONS (Filed Mar. 8, 1993)

Plaintiff Christopher Glynn brought this action under the Jones Act, 46 U.S.C. § 688, and for maintenance and cure, alleging that he was injured while serving as a crew member aboard the No Problem, a fishing vessel owned by Defendant Roy Al Boat Management Corp. and mastered by Defendant Daniel Shawhan. The case was tried before a jury, which returned a verdict in favor of Plaintiff on all claims. In addition to compensatory damages, the jury awarded Plaintiff $50,000 in punitive damages for Roy Al's failure to pay Plaintiff maintenance and cure.

The parties now bring various post-trial motions. For the reasons expressed below Defendants' motion for a new trial is DENIED; Defendants' motion for judgment as a matter of law is GRANTED IN PART and DENIED IN PART; Plaintiff's motion for interests, costs and attorney's fees is GRANTED IN PART and DENIED IN PART; Defendants' motion for sanctions is DENIED; Plaintiff's motion for sanctions is DENIED.

DISCUSSION

I. DEFENDANTS' MOTION FOR A NEW TRIAL

A. Legal Standard

Defendants move for a new trial, pursuant to Fed. R. Civ. P. 59(a). Although there are a number of grounds on which a court may base an order for a new trial, Defendants argue that two are applicable here.

First, Defendants argue that the verdict is against the weight of the evidence. In the Ninth Circuit, a motion for a new trial may be granted on this ground "only if the verdict is against the " 'great weight' " of the evidence . . . or 'it is quite clear that the jury has reached an erroneous result.' " *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984) (citations omitted), *cert. denied*, 473 U.S. 908 (1985).

Second, Defendants argue that a new trial is warranted by the prejudice they claim to have suffered during the trial.

B. Analysis

1. Whether the Jury Verdict Was Against the Great Weight of the Evidence

Defendants argue that the jury verdict was against the weight of the evidence and that reasonable jurors could not conclude that Plaintiff's claimed accident happened, or that the No Problem was unseaworthy, or that any Defendant was negligent, or that maintenance and cure were payable, or unreasonably withheld.

Plaintiff's response is that there was ample evidence to support the jury's verdict. First, Plaintiff argues that his own testimony and that of Joey Bosserman as well as the deposition testimony of Defendant Shawhan were sufficient for the jury to find that the accident occurred. As to the negligence and unseaworthiness claims, Plaintiff contends that each of the percipient witnesses, including Defendant Shawhan admitted that the ladder was slippery.

Plaintiff also argues that the jury's finding that Roy Al's failure to pay maintenance and cure was arbitrary, willful and in bad faith was supported by the evidence that 1) Plaintiff made a demand for maintenance and cure on March 31, 1992, 2) Roy Al was given access to Plaintiff's medical records and was advised by Plaintiff's physician that Plaintiff would need 4-6 weeks of treatment and would be unable to work for a minimum of 3-6 weeks, 3) Plaintiff asked Defendant Shawhan on three occasions for money to see a doctor, 4) Roy Al Boat was advised on May 1, 1992 that Plaintiff was without funds and a place to stay and 5) Dr. Lichter, who conducted an I.M.E., concluded that Plaintiff's fall was the cause of his

injury. Based on this evidence, Plaintiff argues that the jury could find that Defendant Roy Al's decision to withhold maintenance and cure was not made in good faith and was without a reasonable basis.

Given this evidence, the Court cannot conclude that the verdict was against the great weight of the evidence or that the jury reached a seriously erroneous result. Defendants are therefore, not entitled to a new trial based on this ground.

2. Whether Prejudicial Error Entitles Defendants to a New Trial

Defendants also argue that prejudicial error justifies a new trial in this action. They premise this argument on two grounds.

First, Defendants argue that they were prejudiced by their inability to obtain discovery from John Mihlbauer, Plaintiff's expert, until the eve of trial. In this regard, Defendants claim that Mihlbauer failed to answer interrogatories which were submitted to Plaintiff on September 23, 1992 and their only opportunity to depose him was during the afternoon prior to trial. Citing Plaintiff's Complaint, Dr. Portner's Medical Records and Plaintiff's pre-trial statement, Defendants contend that prior to the deposition, Plaintiff's theory of liability was that his injury was caused by a defective latching mechanism on the fish hold hatch cover. However, at the deposition, Defendants argue that Plaintiff advanced an entirely new theory – that the ladder out of the fish hold could be made safer. According to Defendants, the timing of this development gave them no opportunity to test Plaintiff's

new theory because the No Problem was sold on December 14, 1992 and was at sea when Mihlbauer was deposed and throughout the trial.

In response, Plaintiff argues that Defendants are precluded from raising this issue now because they failed to object when Mr. Mihlbauer took the stand and they did not seek a continuance of the trial in response to the "new" theory.

It is axiomatic that when grounds for a new trial come to the attention of a party and the party does not object, he is deemed to have waived the objection. Fed. R. Evid. 103(a)(1); 25 Fed. Proc. L. Ed. § 58:28 (1984). Defendants did not object to Mihlbauer's testimony nor did they request additional time to change their defense. Their failure to act constitutes a waiver and, in this situation, the law does not allow them the benefit of hindsight. Therefore, their motion for a new trial cannot be granted on this ground.

Second, Defendants argue that they were prejudiced by the Court's ruling upon advising the Court that they wished to call James Ross to testify as to Roy Al's reasons for withholding maintenance and cure. Before the trial, Ross informed the Court that he was Roy Al's trial representative and throughout the trial he acted as co-counsel. After Defendants expressed their desire to call Ross to testify, the Court ruled that Plaintiff would be entitled to cross-examine him on the issue of Roy Al's liability insurance coverage.

Defendants claim there was no need for the liability insurance coverage issue to be presented to the jury. They also claim that Ross was the individual who made the

decision not to pay maintenance and cure to Plaintiff after April 16, 1992 and he was the only witness available to Defendants to testify on this issue. According to Defendants, not calling Ross exposed them to the punitive damages awarded by the jury.

In response, Plaintiff claims that Defendants made no offer of proof as to what Ross' testimony would have been. In addition, Plaintiff claims that it would have been proper to question Ross about his representation of Roy Al.

Under the Federal Rules of Evidence, a party may attack the credibility of a witness, Fed. R. Evid. 607, and "[t]he range of evidence that may be elicited for the purpose of discrediting a witness is very liberal. *United States v. Palmer,* 536 F.2d 1278, 1282 (9th Cir. 1976). Evidence of insurance coverage is also admissible if offered to establish a witness' bias. Fed. R. Evid. 411. Here, Defendants' liability insurance coverage would have been a proper subject on which to cross-examine Ross because of his direct economic ties to Defendants' insurance carrier. Establishing these economic ties would have been an appropriate basis for attacking his credibility. *See* 23, Charles A. Wright and Kenneth W. Graham, *Federal Practice and Procedure: Evidence,* § 5367 (1980). Thus, Defendants' motion for a new trial cannot be granted on this ground.

Defendants' motion for a new trial is therefore DENIED.

II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE FOR PARTIAL JUDGMENT AS A MATTER OF LAW

Defendants also move for judgment as a matter of law as to the entire jury verdict, or in the alternative, for partial judgment as a matter of law.

A. Legal Standard and Procedural Requirements

A district court has the authority under Fed. R. Civ. P. 50 to enter judgment as a matter of law. It can only do so, however, where the evidence is such that without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one reasonable conclusion as to the verdict. *Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984). When evaluating the motion, the Court must view the evidence in the light most favorable to the nonmoving party to decide whether substantial evidence exists to support a finding for the nonmoving party. *Shakey's Inc. v. Covalt*, 704 F.2d 426, 430 (9th Cir. 1983).

In order to entertain Defendants' motion now, after the jury has returned its verdict, Defendants must have brought such a motion at the close of all evidence and prior to the submission of the case to the jury. Fed. R. Civ. P. 50(a)(2), 50(b). Defendants did not do so. However, Defendants made a motion for directed verdict after Plaintiff had rested, which the Court took under submission. Rather than address whether Defendants have satisfied the procedural requirements for bringing this motion, the Court will address motion on its merits.

B. Analysis

1. Plaintiff's Claims Against Defendant Shawhan

According to Defendant Shawhan, Plaintiff adduced no evidence to prove that Shawhan was (1) the owner of the F/V No Problem, or (2) Plaintiff's employer, or (3) a resident of Hawaii or that his principal place of business was in Hawaii. Consequently, Defendant Shawhan argues that all claims against him should be dismissed.

A crew member who is injured while aboard a vessel may only bring a claim for unseaworthiness against the vessel owner or a charterer who is in exclusive possession, command and navigation of the vessel. *Cerqueira v. Cerqueira*, 828 F.2d 863, 865 (1st Cir. 1987) (citation omitted). Plaintiff adduced no evidence during trial that Defendant Shawhan was the owner of the No Problem or that he was in exclusive possession, command and navigation of the vessel. Therefore, Defendant Shawhan's motion for judgment as a matter of law as to Plaintiff's unseaworthiness claim is GRANTED.

In contrast to unseaworthiness claims, claims under the Jones Act and for maintenance and cure may only be brought against the crew member's employer. *Id.* According to Shawhan, he was not Plaintiff's employer. In support of this argument, Shawhan maintains that the crew contract states that the No Problem was owned by Defendant Roy Al Boat Management Co. and was mastered by Defendant Shawhan and does not state who, if anyone, was to be Plaintiff's employer. Shawhan also points out that Plaintiff testified on direct that Shawhan told him

that they were all employees of Roy Al Boat. Furthermore, Shawhan argues that the Court instructed the jury that Roy Al was Plaintiff's employer and left it to the jury to determine whether Shawhan was Plaintiff's employer. According to Defendants, Plaintiff can only have one Jones Act employer and Plaintiff's counsel asserted that the employer was Roy Al.

In response to Defendant Shawhan's motion, Plaintiff argues that since Shawhan had control over Plaintiff, he was Plaintiff's employer.

In its Order of January 26, 1993, the Court reviewed the factors that are used to determine whether an employment relationship exists. *See Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 329 (1991). The Court's conclusion in that Order was that

> the relationship between Defendant Shawhan and Plaintiff bears all the indicia of being an employer-employee relationship. For example, Defendant Shawhan determined what Plaintiff's tasks were and how and when they were to be carried out. In addition, Defendant Shawhan determined where the boat would set its fishing lines, how long the boat would be at sea, where the catch would be sold and at what price. Plaintiff had no say whatsoever as to his assignments aboard the No Problem, its operation or the disposition of its catch.

Order of January 26, 1993 at 3.

Contrary to Defendants' unsupported assertion, a seaman may have more than one Jones act employer. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 225 (5th Cir. 1975);

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1980). In addition, the testimony of Plaintiff, Joey Bosserman and Defendant Shawhan provided sufficient evidence for the jury to conclude that Shawhan was Plaintiff's employer.

Finally, Defendant Shawhan contends that venue was improper in this Court because his residence and principal place of business is Florida, not Hawaii. A defense of improper venue is timely only if made before answering by motion under Fed. R. Civ. P. 12 or in the first responsive pleading. Otherwise, the objection is waived. Fed. R. Civ. P. 12(h)(1). Here, Defendant did not raise his objection to venue until after the jury had returned with its verdict. As such, the objection is not timely and is therefore waived.

Thus, Defendant Shawhan's motion for judgment as a matter of law as to Plaintiff's negligence claim and claim for maintenance and cure is DENIED.

2. Plaintiff's Claims Against All Defendants

a. The Negligence and Unseaworthiness Claims

Defendants argue that they are entitled to judgment as a matter of law because Plaintiff's story is "incredible beyond belief" and no reasonable person could find that the claimed accident occurred. Defendants support their argument with a comparison of the Plaintiff's testimony and the undisputed evidence adduced at the trial. According to Defendants, this comparison, which they support with scale drawings, reveals that Plaintiff could

not have been holding the hatch cover above his head, could not have latched the cover in the vertical position and could not have been struck by the cover in the position he claims he was standing.

Defendants also argue that the evidence was insufficient to support the jury's findings as to negligence and unseaworthiness. First, Defendants contend that the jury could not make these findings without expert testimony and that their common experience is inadequate. Second, Defendants argue that there was no foundation for the testimony of Plaintiff's expert, John Mihlbauer, who also offered no opinion as to the vessel's unseaworthiness. In addition, Defendants claim that Mihlbauer's testimony was not competent as to what equipment would have been more suitable. Third, Defendants claim that the undisputed evidence was that the hatch cover and fish hold ladder were standard equipment for a fishing vessel of the No Problem's size and type and were state of the art in their design. Finally, Defendants contend that Plaintiff's mere allegation that the ladder could have been slippery is insufficient to sustain a prima facie case of either negligence or unseaworthiness.

The analysis contained in section I.B.1 of this Order is equally applicable to Defendants' motion for judgment as a matter of law. Therefore, Defendants' motion is DENIED.

b. Plaintiff's Claim for Punitive Damages Due to Roy Al's Failure to Pay Maintenance and Cure

Defendant Roy Al argues that Plaintiff is not entitled to punitive damages on his maintenance and cure claim. This argument is based on two grounds.

First, Defendant cites precedent from this Court in support of his motion. Almost a year ago, Judge David Ezra held that an injured seaman was not entitled to punitive damages for a dive boat owner's willful failure to pay him maintenance and cure. *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F.Supp. 827, 831 (D. Haw. 1992), *citing Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990). The *Miles* Court held that Jones Act claimants could not recover damages for loss of society and future earnings because such remedies were not specified in the Act. *Miles*, 498 U.S. ___, 111 S.Ct. at 325-26. A number of district courts, including this one, have extended the *Miles* reasoning to bar punitive damages in unseaworthiness cases and in *La Voie*, Judge Ezra extended this reasoning to maintenance and cure cases. *La Voie*, 797 F.Supp. at 831. Roy Al argues that *La Voie* is controlling here and bars Plaintiff's claim for punitive damages.

Defendant's reading of *La Voie* is incomplete. Although Judge Ezra barred the plaintiff in that case from seeking punitive damages, he held that the seaman could seek *attorney's fees* where the shipowner had been " 'wilful and persistent' " in its failure to investigate his claim or to pay maintenance." *La Voie*, 797 F.Supp. at 831, *quoting Vaughan v. Atkinson*, 369 U.S. 527 (1962) (holding that employer has a duty to investigate crew member's

claim). In reaching this conclusion, Judge Ezra reasoned that *Vaughan* was not inconsistent with *Miles* since *Vaughan* did not discuss punitive damages, only the award of attorney's fees. *Id.* Judge Ezra also noted that while there was no dispositive Ninth Circuit authority on the issue, the Ninth Circuit had indicated its agreement with the approach of other circuit courts which had construed *Vaughan* to allow attorney's fees only when the failure to provide maintenance and cure was "arbitrary, recalcitrant or unreasonable." *Id.* at n.3, *citing Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985).

Defendants did not object to the punitive damages instruction given to the jury. Unlike Defendants' failure to object to the testimony of John Mihlbauer, however, its failure to object to the jury instruction does not preclude the entry of judgment as a matter of law if the law so requires. *Johnson v. United States*, 434 F.2d 340, 343 (8th Cir. 1970). Therefore, Defendants' motion for judgment as a matter of law as to punitive damages is GRANTED.

Although punitive damages are not available to the Plaintiff, attorney's fees are, provided that Plaintiff can prove that Defendant's failure to pay maintenance and cure was arbitrary, recalcitrant or unreasonable.

The verdict form which the jury was instructed to complete asked the jurors to determine whether "defendants acted arbitrarily, wilfully and with bad faith in failing to provide maintenance and cure to plaintiff and that such failure resulted in some injury to the plaintiff." the jurors answered "yes." The jurors also determined that the Plaintiff was entitled to punitive damages. The

issue of attorney's fees was never submitted to the jury because the parties had agreed during the pre-trial conference that the Court would determine the amount of fees, if recoverable.

Defendant Roy Al Boat claims that there was no evidence to support the jury's finding that its failure to pay maintenance and cure was arbitrary, willful and in bad faith. In support of this argument, Defendant contends that 1) it was undisputed at trial that Shawhan and the crew were unaware of the accident during the voyage, 2) that Defendant's attorney inspected the fish hold and determined that it was improbable that the accident could have occurred and, 3) the evidence at trial indicated that the accident could not have occurred.

Plaintiff's response mirrors his response to Defendants' motion for a new trial. *See* § I.B.1. supra.

Based on the evidence adduced at trial, the Court cannot conclude that there is but one conclusion that reasonable persons could have reached. There was substantial evidence for the jury to find that Roy Al acted arbitrarily, wilfully and in bad faith in failing to provide Plaintiff with maintenance and cure. Therefore, Plaintiff is entitled to an award of attorney's fees, the amount of which is discussed in section III.C. of this Order.

III. PLAINTIFF'S MOTION FOR INTEREST, COSTS AND ATTORNEY'S FEES

A. Interest

Plaintiff moves for an award of prejudgment interest. The Ninth Circuit has held that in admiralty cases, "prejudgment interest must be granted unless peculiar circumstances justify its denial." *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir. 1981). In addition, it is an abuse of discretion if the district court denies prejudgment interest and fails to justify its denial with specific findings of fact. *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 669 F.2d 1259, 1263 (9th Cir. 1982). Among the peculiar circumstances which may justify a denial of prejudgment interest are 1) unwarranted delay by counsel, 2) claims or defenses asserted in bad faith, and 3) uncertainty regarding claims or damages. *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 797-98 (9th Cir. 1980). Plaintiff claims that none of these circumstances apply in this case.

In response, Defendants argue that the issue should have been submitted to the jury and cite *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981) in support of their argument. The *Havis* Court held that in a maritime case tried solely to a jury demanded under the exercise of diversity jurisdiction, the issue of prejudgment interest must be submitted to the jury. *Id.*, at 55.

Although the Ninth Circuit has not addressed this issue, other circuits that have appear to be in agreement with *Havis*. *See Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1052 (1st Cir. 1973); *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732, 735 (2d Cir. 1955).

The issue was not submitted to the jury. However, Plaintiff had an opportunity to request such an instruction and did not object to the instructions the jury was ultimately given. Therefore, Plaintiff's motion for prejudgment interest is DENIED.

B. Costs

Plaintiff also moves for an award of costs pursuant to Fed. R. Civ. P. 54(d). In addition, he argues that the fees he paid to his expert were "necessary expenses" to obtain his maintenance and cure under *Vaughan*. Defendants oppose this portion of Plaintiff's request.

The court has discretion to award costs pursuant to 28 U.S.C. § 1920 and may award witness fees and expenses under 28 U.S.C. § 1920(3) provided the testimony of the witness was material to an issue in the case and reasonably necessary to its disposition. *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1361 (9th Cir. 1977). In awarding fees for expert witnesses, the Court is not limited to the statutory rate and has the discretion to award additional fees where "the expert testimony was crucial or indispensable in establishing the prevailing party's case or defense." *United States v. City of Twin Falls, Idaho*, 806 F.2d 862, 878 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987). However, this discretion is to be exercised sparingly. *Id.*

In his bill of costs, Plaintiff requests that Defendants be taxed $1,482.00 for consultation and court testimony of John Mihlbauer. Given that the jury heard testimony from Plaintiff, Joey Bosserman and Defendant Shawhan as to

the ship's condition, Mihlbauer's testimony was not crucial to Plaintiff's case. Consequently, Plaintiff is entitled to recover $40 for Mihlbauer's one day appearance. 28 U.S.C. § 1821(b).

Plaintiff bill of costs also requests $520,00 for "Dr. Bernard Portner." Since the bill of costs lacks specificity as to the nature of this charge, the Court is unable to determine whether it is taxable under 28 U.S.C. § 1920. The line items for copies, messenger service, postage, fax and telephone are likewise not taxable. Therefore, Plaintiff's request to tax these items is DENIED.

The remaining items are taxable. Therefore, Plaintiff shall recover costs in the amount of $4,440.11.

C. Attorney's fees

As stated in section II.B.2.b. of this Order, Plaintiff is entitled to attorney's fees that resulted from his efforts to recover the maintenance and cure Roy Al withheld. The amount of attorney's fees is within the discretion of the trial court, which must consider the following factors:

(1) the time and labor required in the case,

(2) the novelty and difficulty of the questions involved,

(3) the skill required to properly perform the legal service,

(4) the employment foregone by the attorney due to acceptance of the case,

(5) the customary fee,

(6) whether the fee is contingent or fixed,

(7) time limitations imposed by the client or the circumstances,

(8) the amount in dispute and the results obtained,

(9) the experience, reputation and ability of the attorneys,

(10) the "undesirability" of the case,

(11) the nature and length of the professional relationship with the client, and

(12) awards in analogous cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

Plaintiff's maintenance and cure claim did not engender complicated questions of fact or law and constituted only a small portion of the trial. Furthermore, the case was filed and tried in less than a year and nothing in the record suggests that Plaintiff's attorney was required to conduct complicated discovery or legal research in preparation for this trial. Given the simplicity of the issues involved, it was not necessary for Plaintiff to be represented by an attorney with extraordinary or specialized skills to prosecute his claim properly. Based one this Court's opportunity to observe Plaintiff's counsel, the Court concludes that Plaintiff's counsel was a capable attorney but was not someone with unusual abilities.

Although it is not reflected in the record, Plaintiff and his counsel probably had a contingent fee agreement, which would entitle Plaintiff's counsel to a share of Plaintiff's recovery. The jury awarded Plaintiff $7,600 on his maintenance and cure claim. The affidavit of Plaintiff's

counsel indicates that Plaintiff accrued $61,069.01 in attorney's fees for all of his claims. However, at the oral argument on this motion, Plaintiff's counsel indicated that his claim for fees should be reduced by $6,000 due to a settlement the parties had reached with respect to Plaintiff's salvage claim and indicated that half of the remainder (approximately $27,500) represented his efforts in pursuing Plaintiff's maintenance and cure claim.

The award suggested by Plaintiff's counsel is more than three times the recovery Plaintiff received on his claim for maintenance and sure [sic]. Such an award is not warranted in this case.

Given the analysis above, the Court concludes that Plaintiff's counsel is entitled to $7,600 in fees for Plaintiff's maintenance and cure claim.

IV. DEFENDANTS' MOTION FOR SANCTIONS

Defendants move for sanctions arguing that the Plaintiff and Plaintiff's counsel committed a number of acts during the course of this litigation that were violative of Fed. R. Civ. P. 11. According to Defendants, sanctions are appropriate because 1) several of the allegations in Plaintiff's Complaint were made without reasonable inquiry, 2) many of Plaintiff's interrogatories were either redundant or irrelevant, and 3) Plaintiff gave a false or misleading answer to one of Defendant's interrogatories. In light of this conduct, Defendant argues that the Court should conclude that Plaintiff's case was filed solely to intimidate and harass Defendants into settling what were meritless claims.

Other than an ambiguous reference to "respectable authorities" in the Fifth Circuit, Defendants cite no legal authority whatsoever in support of their motion. Rather, it is a pastiche of bald assertions having little persuasive value.

Rule 11 is intended to deter frivolous filings and filings made for improper purposes (i.e. for personal or economic harassment). *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989). Furthermore, a district court is not to find a complaint based on reasonable inquiry to be factually frivolous "unless some clear authority or a litigant's own clear admission erases the factual underpinning from some essential element of the litigant's pleading." *Greenberg v. Sala*, 822 F.2d 882, 887-889 (9th Cir. 1987).

The Court has examined Plaintiff's alleged violations and Plaintiff's opposition to Defendants' motion and concludes that sanctions are not warranted and would be inappropriate in this case. First, the Court finds that Plaintiff's allegations concerning the parties' states of residence and his Plaintiff's employer were reasonable. Second, the jury found in Plaintiff's favor on the allegations Defendants claim were unsupported by the evidence and the Court denied Defendants' motion for a judgment as a matter of law. *See* § II, supra. Third, Defendants had an opportunity to object to Plaintiff's interrogatory requests at the time they were made but apparently chose not to do so. As to the false answer Plaintiff is alleged to have given to one of Defendants' interrogatories, Defendants provide neither the interrogatory in question nor the answer alleged to have been

false. Therefore, Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 is DENIED.

Arguing that Defendant's motion for sanctions is frivolous, Plaintiff's counsel request that the Court order the Defendants' counsel to pay the costs they incurred in responding. The Court finds that Defendants' motion does not warrant sanctions. Therefore, Plaintiff's motion is DENIED.

V. FINAL COMMENT

As the Court made clear at the oral argument on these motions, it is disturbed by the numerous instances in which counsel failed to cite authority in support of their arguments and asserted propositions that were blatantly contrary to settled law. Such conduct evinces a lack of respect for this Court and frustrates the Court's objective to assure that a just result is achieved in every case.

The Court, therefore, advises counsel that in the future they are to research the legal issues they seek to have this Court address and indicate to the Court what legal authority supports their position and why. Failure to do so may very well result in sanctions.

Counsel is further advised to become familiar with and, where appropriate, utilize the various pretrial procedures available under the Federal Rules of Civil Procedure for narrowing the issues in future cases they have adjudicated in this Court. The Court believes that had counsel done so in this case, all of the proceedings could

have been conducted without the delay and disruption that characterized this case.

IT IS SO ORDERED.

DATED: 3/3/93

/s/ Spencer Williams
U.S. DISTRICT
COURT JUDGE*

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* Of the Northern District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHRISTOPHER GERALD GLYNN, Plaintiff, vs. ROY AL BOAT MANAGEMENT CORP., DANIEL J. SHAWHAN *In Personam*, and F/V NO PROBLEM, O.N. 650399, her engines, equipment, appurtenance, Cargo freight and catch; and, F/V FULL MOON, her engines, equipment, appurtenances, cargo freight and catch *in Rem*, Defendants.	Civil No. 92-00182 DAE

ORDER REVERSING MAGISTRATE JUDGE'S ORDER CONDITIONALLY GRANTING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT

(Filed Oct. 21, 1992)

BACKGROUND

Christopher Glynn commenced this action on April 1, 1992 seeking damages from a back injury that he allegedly suffered aboard the vessel, the "No Problem," on March 22, 1992.

On May 27, 1992, an entry of default was made against defendants. Defense counsel states that his failure

to make a timely answer was a result of his failure to calendar the reply due date, because of settlement discussions ongoing with Glynn, and because of an agreement that allegedly existed allowing defendants an indefinite amount of time to answer the complaint while settlement discussions were ongoing. Defendants moved to set aside the entry of default.

On August 5, 1992, Magistrate Judge Daral Conklin issued an order conditionally granting defendants' motion to set aside the entry of default. The conditions placed upon that removal were that defendants pay maintenance to Glynn at the rate of $30.00 per day, and that defendants reimburse Dr. Bernard Portner for his treatment of plaintiff.

Defendants bring this appeal from the magistrate judge's ruling to the extent that the order conditioned the setting aside of the default upon the payment of maintenance and cure.

STANDARD OF REVIEW

We review the magistrate Judge's ruling under the clearly erroneous standard:

> The district judge to whom the case is assigned shall consider objections [to a magistrate judge's ruling on a non-dispositive pretrial matter] made by the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a).

DISCUSSION

Defendants characterize the magistrate judge's order as an effective grant of summary judgment in favor of Glynn in the issue of maintenance and cure. Defendants state that this action is inappropriate because such a motion was never raised by Glynn, and because Glynn would not be entitled to judgment in his favor even if the issue had been raised.

The record is inconclusive as to when and in what form the issue of maintenance and cure was raised. Regardless of whether the issue was actually raised, the court finds that a grant of maintenance and cure would have been inappropriate by the magistrate judge.

Under the law of admiralty, a seaman who becomes ill or suffers an injury while in the service of his vessel is entitled to maintenance and cure at the expense of the shipowner. 1B *Benedict on Admiralty* (seventh edition) § 42, 4-5 Schoenbaum, *Admiralty and Maritime Law* (practitioner's edition) 163.

A maintenance and cure action may be brought in the federal court if the requirements of diversity of citizenship and jurisdictional amount are satisfied. *Benedict on Admiralty*, 4-8. In such an action, the burden of proof rests on the seaman to show that he is an actual seaman, and that he became ill or injured while in the service of a ship. *Id.*

Glynn correctly points out that he has made out a prima facie claim for maintenance and cure. But while he has met his burden of production, he has not as yet met his burden of proof. Several disputes exist over issues of

material fact. Defendants contend that the accident never occurred at all. Glynn's accident was unwitnessed, and defendants contend that Glynn delayed a significant amount of time in reporting the accident. Furthermore, defendants contend that Glynn continued to perform his duties aboard the ship after the accident.

The magistrate judge was correct to point out to defendants that they expose themselves to additional liability by refusing to pay Glynn's maintenance and cure. Failure to pay maintenance and cure may make an employer responsible for any aggravation of the injury suffered by the seaman. Schoenbaum at 163. Additionally, an employer's willful and arbitrary refusal to pay maintenance and cure may give rise to additional damage claims beyond a plaintiff's claim for general damages. *See, e.g., Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984). Nonetheless, a material issue of fact exists as to whether Glynn is entitled to maintenance and cure. Awarding summary judgment against defendants on this issue would be premature at this point.

Plaintiff correctly notes that the court may condition a relief from default upon such conditions as are necessary to rectify any prejudice suffered by the nondefaulting party as a result of the default and the subsequent reopening of the litigation. *See, e.g.*, 10 Wright & Miller, *Federal Practice and Procedure*, 538. That relief, however, may not take the form of a decision on the merits of the ultimate issue in a case.

The ruling of the magistrate judge was clearly erroneous to the extent that it conditioned the setting aside of the entry of default upon the payment of maintenance

and cure. The court orders that the default be removed unconditionally.

No attorney fees shall be awarded at this time, the court reserves the issue for later determination at the conclusion of the case.

CONCLUSION

For the reasons stated above, the court GRANTS IN PART defendants' appeal from magistrate judge's order conditionally granting defendants' motion to set aside entry of default.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 21 1992 .

/s/ David Alan Ezra
David Alan Ezra
UNITED STATES
DISTRICT COURT

Christopher Gerald Glynn vs. Roy Al Boat Management Corp., et al., Civil No. 92-00182 DAE; ORDER REVERSING MAGISTRATE JUDGE'S ORDER CONDITIONALLY GRANTING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHRISTOPHER GERALD GLYNN, Plaintiff, vs. ROY AL BOAT MANAGEMENT CORP.; DANIEL J. SHAWHAN *In Personam* and F/V NO PROBLEM, O.N. 650399, her engines, equipment, appurtenance, cargo freight and catch; and, F/V FULL MOON, her engines, equipment, appurtenances, cargo freight and catch *In Rem*, Defendants.	CIVIL NO. 92-00182 DAE (In Admiralty) **ORDER CONDITIONALLY GRANTING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT ENTERED MAY 27, 1992** (Filed Aug. 8, 1992) Date: July 30, 1992 Time: 9:00 a.m. Judge: Daral G. Conklin

ORDER CONDITIONALLY GRANTING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT ENTERED MAY 27, 1992

Defendants Roy Al Management Corp., Daniel J. Shawhan, and F/V No Problem having moved this Court through their counsel, George W. Ashford, Jr. on July 16, 1992 by oral motion to set aside the entry of default entered May 27, 1992; and said Defendants having confirmed the motion by written motion filed herein on July 21, 1992; and the said motion having come on regularly for hearing before Magistrate Daral G. Conklin on July 30, 1992 at 9:00 a.m. and the court having considered the memoranda and affidavits both in support of and in opposition to the motion, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion To Set Aside Entry Of Default Entered May 27, 1992 is conditionally granted as follows:

The entry of said Defendants' default entered herein on May 27, 1992 is hereby set aside conditioned, however, upon (a) said Defendants' payment to Plaintiff of maintenance, at the rate of $30,00 per day, from and including April 15, 1992 up to and including the date of this order, which order shall be dated and entered not later than August 7, 1992; and (b) said Defendants' payment to Dr. Bernard Portner for his treatment to Plaintiff on account of the alleged March 22, 1992 injury in the amount of $5,113.94 for said treatment through July 22, 1992.

The foregoing payments by said Defendants shall be made on or before the date of entry of this order and in no event after August 7, 1992, in default of which the said May 27, 1992 entry of default shall stand.

DATED: Honolulu, Hawaii, AUG 05 1992 .

/s/ DARAL G. CONKLIN
MAGISTRATE
DARAL G. CONKLIN

APPROVED AS TO FORM:

/s/ Jay Lawrence Friedheim
Jay Lawrence Friedheim
Attorney for Plaintiff

CIVIL NO. 92-00182 DAE; *GLYNN v. ROY AL BOAT MANAGEMENT CORP.*, ORDER CONDITIONALLY GRANTING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT ENTERED MAY 27, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER GERALD GLYNN, Plaintiff-Appellant/ Cross-Appellee. v. ROY AL BOAT MANAGEMENT CORP.; DANIEL J. SHAWHAN, in personam; F/V/ NO PROBLEM, O.N. 650399, her engines, equipment, appurtenances, catch, in rem; F/V FULL MOON, her engines, equipment, appurtenance, cargo freight and catch, in rem, Defendants-Appellees/ Cross-Appellants.	Nos. 93-15546, 93-15681 D.C. No. CV-92-00182-DAE ORDER (Filed July 31, 1995)

Before: FARRIS, BEEZER and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Beezer and Rymer vote to reject the suggestion for rehearing en banc and Judge Farris so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.